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No. 89-753

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RON ANGELONE, Director, Nevada Department of Prisons, and BRIAN McKAY, Attorney General of the State of Nevada, Petitioners

v.

HENRY DEUTSCHER, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent Deutscher believes that the issues raised by the State of Nevada petitioners ("petitioners" or "the State") are more accurately restated as follows:

1. Whether both the District Court and the Court of Appeals abused their discretion in refusing to deny a habeas petition on grounds of abuse of the writ where the initial petition was filed in trial counsel's name, without any involvement of the habeas petitioner; where trial counsel gave no thought to raising any other issues and did not raise his own conceded ineffective assistance of counsel; and where the State opposed the addition to the original habeas petition of the new issues.

2. Whether the Court of Appeals erred in concluding that the deficient performance of counsel at the penalty phase was likely prejudicial where counsel failed to present available evidence of impaired mental status and background and character, failed to object to the prosecution's statements that intent and mental impairment were irrelevant, and erroneously conceded in closing argument the presence of aggravating circumstances and the absence of mitigating circumstances.

3. Whether this Court need review the application by the Court of Appeals of Godfrey v. Georgia and Maynard v. Cartwright where the Court of Appeals' decision on that issue was not necessary to the judgment and where the appropriateness and wording of any depravity of mind instruction will have to be considered at the time of retrial even if this Court does not review the issue.

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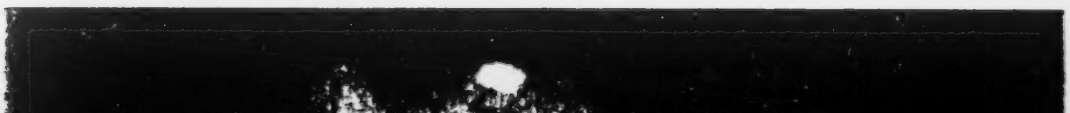


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INTRODUCTION

Respondent, Henry Deutscher, petitioner in the writ of habeas corpus below, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the opinion of the Court of Appeals, reported at 884 F.2d 1152 (9th Cir. 1989).

STATEMENT OF FACTS

Early one morning, the body of a woman was discovered in an isolated area of Las Vegas. She had been strangled and beaten.

The victim had been seen the night before, leaving a nearby tavern in the company of respondent Deutscher. Deutscher was charged with murder in the first degree and robbery without the use of a deadly weapon. Herbert F. Ahlswede, an assistant public defender, was appointed as counsel because Deutscher could not afford counsel of his choice.

The trial court appointed two psychiatrists to determine Deutscher's competency to stand trial. One found serious mental impairment and recommended an EEG to help diagnose any organic cause. When he learned that the EEG report was negative, Ahlswede abandoned the idea of contesting competency or entering a plea of insanity, but did not speak further with the referring psychiatrist. The psychiatrist would have testified that the report was likely a false negative. The psychiatrist would have testified that Deutscher was suffering from a severe mental impairment, probably arising from injuries suffered before birth due to a beating by his father that caused him to be born substantially prematurely. Among other things, the psychiatrist would have testified that this impairment can cause uncontrollable outbursts of violence, particularly under stress and when intoxicated.

The public defender spent 15 or 20 minutes interviewing Deutscher, but would not respond to the efforts of Deutscher's mother and sisters to talk to the public defender and explain Deutscher's background and character. Although disclosed by Deutscher, the public defender did not explore a prior history of voluntary and involuntary civil commitment for mental problems, a history that included a plea by Deutscher to be provided treatment before he hurt somebody and prior incidents of uncontrollable "blackouts."

At the guilt phase, there was no evidence of premeditation, although the prosecution invited the jury to speculate as to motive. A pathologist testified that the bruises and bites occurred while the victim's heart was still beating. He could not determine if any had occurred while the victim was conscious. The jury was instructed that the victim's death was first degree murder, even if "unintentional or accidental," if it was committed "in the perpetration or attempted perpetration" of rape or robbery. The prosecution repeatedly emphasized that intent or premeditation was not necessary.

The jury convicted Deutscher of first degree murder and of robbery.

This was the first death penalty case in Nevada since 1972 and the first experience in the state with a bifurcated death penalty trial. It did not occur to Ahlswede, the public defender, that evidence of mental impairment might be useful at the penalty phase even if it would not likely have resulted in a finding of not guilty by reason of insanity. Counsel put on no evidence at the penalty phase--not the psychiatrist, not the relatives, not the prior treating psychiatrists, and not even Deutscher himself, although his prior conviction was already before the jury as part of the prosecution's penalty phase case. The jury was instructed that possible aggravating factors included a prior conviction of a felony involving use or threat of violence; murder during an attempted sexual assault; and murder involving "torture, depravity of mind, or the mutilation of the victim." As to the latter factor, the jury was instructed in the disjunctive, and the prosecutor argued that any one element alone was enough. The jury was instructed, in part, that "depravity of mind" is "a state of mind outrageously, wantonly

vile, horrible, or inhuman." The statutory mitigating circumstances were listed for the jury, and the jury was instructed to impose a sentence of death unless the mitigating circumstances outweighed the aggravating circumstances.

In closing argument, the prosecution emphasized the contention that only a sentence of death would assure that Deutscher would be separated from society and stated, without objection, that Deutscher's intoxication or lack of intent were not mitigating factors. Ahlswede admitted the aggravating circumstances, admitted that there was no excuse for what had been done, and stated only that "such a sick mind is not to be punished but rather to be pitied." The prosecution responded by pointing out that if there was any evidence of mental impairment, a psychiatrist would surely have been called to testify.

The jury found all three aggravating factors and concluded that they were not outweighed by any mitigating circumstance. Deutscher was sentenced to die.

The Nevada Supreme Court affirmed the conviction and sentence, with two judges concurring in the result only. 601 P.2d 669 (1979). Ahlswede then petitioned in his own name, but purportedly on behalf of Deutscher, for a writ of habeas corpus from the United States District Court for the District of Nevada, raising such issues as a contention that Las Vegas is not part of Nevada and that the instructions improperly referred to "rape" rather than "sexual assault." The District Court denied the writ without an evidentiary hearing.

Ahlswede appealed to the Ninth Circuit, and present counsel was appointed. Present counsel immediately determined that a number of meritorious federal constitutional issues had not been raised by the public defender, including his own ineffective

assistance at trial, on direct appeal, and in the state and federal post-conviction proceedings. Deutscher therefore requested that the case be remanded to the District Court to allow him to file his own petition or to amend the public defender's petition to add the new issues. Deutscher also filed a post-conviction proceeding in his own name in state court. In the Ninth Circuit, and later in response to Deutscher's certiorari petition in this Court, the State opposed remand on the ground that the new issues could be presented in subsequent proceedings. The Court of Appeals denied remand and affirmed the dismissal of Ahlswede's petition. This Court denied the petition for writ of certiorari.

The parties returned to state court to litigate the second post-conviction petition. The state trial court denied requests for discovery and funding of expert witnesses and other resources, but granted a limited evidentiary hearing. The state trial court denied relief, and the Nevada Supreme Court affirmed.

The first federal habeas petition by Deutscher himself was filed in September 1986. The District Court accepted the full record of the evidentiary hearing in state court and granted requests by both sides for supplemental evidentiary hearings. The Court ultimately found that Ahlswede's performance at the penalty phase was below minimal constitutional standards but was probably not prejudicial. The Court rejected, largely on procedural default grounds, a number of other challenges to the penalty phase, including challenges to the depravity aggravating circumstance, the requirement that mitigating factors outweigh aggravating factors, and the failure to require some level of scienter.

The Ninth Circuit reversed the District Court on the question of prejudice, thus mandating that the jury's penalty phase

determination be set aside. In light of the possibility of a retrial, the Court addressed the instructions as to the depravity of mind aggravating circumstance and found them constitutionally deficient.

REASONS FOR DENYING THE WRIT

The State of Nevada petitioners have failed to justify review by Court. The decision of the Court of Appeals is, on its face and in fact, consistent with prior decisions of this Court and of other circuits. The issues raised by the State are fact-specific and are controlled by the unusual aspects of this case. Most of the questions presented as stated by petitioners are not in fact properly raised, and the judgment below would stand on alternate grounds in any event.[1]

A. First Question Presented: Abuse of the Writ

The State contends that the decision of the Court of Appeals presents questions whether a habeas petitioner must prove that he has not abused the writ and whether abuse of the writ may be shown even absent a determination that the habeas petitioner made a conscious decision to withhold claims from a previous petition. These issues are not raised by the decision or record below. The opinion below does not free a habeas petitioner from having to respond to an allegation of abuse of the writ. The Court of Appeals made no such statement; at most it implicitly accepted Deutscher's contention that a separate evidentiary hearing on abuse of the writ is unnecessary where undisputed

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[1]The Court of Appeals erred in affirming the District Court's ruling that procedural default precluded such meritorious federal constitutional challenges as that to the requirement that mitigating circumstances outweigh any aggravating circumstance. That and other challenges would independently support the judgment below.

facts rebutting the State's allegation are already before the District Court.

In addition, petitioners misstate the Ninth Circuit's holding as to the appropriate standard. The Court did not limit abuse to a habeas petitioner's deliberate decision to withhold claims, but referred specifically to action by "counsel" and included not only conscious withholding but also "piecemeal litigation [and actions that] vex, harass, or delay." Appendix A-16. That standard is fully consistent with Rule 9(b) of the Section 2254 rules and with this Court's decision in Sanders v. United States, 373 U.S. 1 (1963). Moreover, it is precisely the standard that the State urged on the Court below. See Responding/Opening Brief of Respondents/Appellees-Cross-Appellants at 10, Ninth Cir. No. 88-2552.

Moreover, abuse is not present on this record regardless of the standard applied. The initial petition was filed in the lawyer's name and without any consultation with the client, in plain violation by counsel of Rule 2 of the Section 2254 rules. The State made no effort to correct that error and involve Deutscher. Prior counsel testified in the state court evidentiary hearing (made part of the federal record by stipulation) that he was not aware of and gave no thought to the issues in question, and he has now been determined to have provided constitutionally deficient assistance at trial by both lower federal courts. Present counsel entered the case shortly after the District Court denied the first federal habeas petition. Counsel immediately identified the missing claims and asked the Ninth Circuit to remand the case to the District Court so that the petition could be amended to add the new issues. Petitioners opposed that request, arguing that petitioner could raise the

issues in a new petition. Appellees' Brief at 7, Ninth Cir No. 82-5831. Counsel who was in fact ineffective at trial should not be allowed to make a decision binding on his client not to raise that issue in a habeas petition, see Osborn v. Shillinger, 861 F.2d 612, 622 (10th Cir. 1988), and petitioners should be estopped from alleging abuse of the writ when it was their actions that kept the additional issues from being added to the initial habeas petition at the earliest possible moment.

Finally, the question of abuse of the writ rests in the District Court's discretion under the plain language of Rule 9(b) and this Court's decisions. See Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986); Sanders v. United States, supra. As the State agreed below, the District Court's decision is reviewable only for abuse of discretion. Answering/Opening Brief of Respondents/Appellees-Cross-Appellants, Ninth Cir. No. 88-2552, at 3. Both lower federal courts have concluded that there was no abuse of the writ, and that conclusion is surely not an abuse of discretion under the unique facts of this case. Even if there had been a showing of abuse, denial of the writ would have been a manifest injustice in light of the now-conceded fact that prior counsel's assistance did not satisfy constitutional standards.

B. Second Question Presented: Prejudice From Ineffective Assistance of Counsel

Both lower courts held, and the State has now conceded, that the performance of trial counsel at the penalty phase fell below minimal standards. The State continues to argue that there was no prejudice. The first part of the question presented by the State is a very narrow issue as to the effect of the prosecution psychiatrist's testimony at the federal habeas evidentiary hearing. Even if the Court of Appeals erred in its conclusion that

such testimony could not have been introduced in the penalty phase, the Court had already concluded that the testimony did not outweigh Deutscher's showing of prejudice. The Court of Appeals did not refuse to consider the psychiatrist's testimony but raised the constitutional issue only as an alternative holding after the Court had fully weighed the psychiatrist's testimony. The fact that the State might have contested the interpretation of the missing evidence as to Deutscher's mental condition and background does not mean that the failure to adduce such evidence was not prejudicial.

The State argues that the Court of Appeals misinterpreted Estelle v. Smith, 451 U.S. 454 (1981). The record, however, does not support that allegation. Even if testimony in the penalty phase by the court-appointed competency psychiatrist would not have been a Fifth Amendment violation, it would clearly have been a Sixth Amendment violation where, as here, counsel had not intended to make mental status an issue at the penalty phase and had not had the opportunity to counsel the client as to the proposed examination. This Court recently made that very point and distinguished the decisions relied upon by the State. Powell v. Texas, 109 S. Ct. 3146 (1989); see Satterwhite v. Texas, 486 U.S. 249 (1988).

The State also complains that the Court of Appeals engaged in "impermissible appellate fact finding." This issue is not worthy of the Court's review. The Court of Appeals did not overturn the District Court on any findings of historical fact, and the interpretation of whether those facts establish prejudice is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). The Court of Appeals merely fulfilled its responsibility to review the District Court's interpretation of

the facts under the proper legal standard. The State does not challenge the standard applied by the Court of Appeals, and below it did not contest Deutscher's contention that the Court of Appeals must apply the standard de novo.

The Court of Appeals' application of the prejudice standard is unremarkable. Counsel's failure to investigate or utilize the available mitigation evidence denied Deutscher his right to have the jury "consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." Penry v. Lynaugh, 492 U.S. ____, 109 S. Ct. 2934, 2951 (1989). Counsel's performance was the functional equivalent of having no counsel whatsoever at the penalty phase.

C. Third Question Presented: Depravity Aggravating Circumstance

The State argues that because it might be precluded on retrial from utilizing the depravity of mind instruction employed at the original trial, this Court should review that instruction at this time. The ruling of the Court of Appeals was not necessary to the Court's judgment.[2] Such interlocutory review is neither necessary nor appropriate. This Court has already provided substantial guidance on the depravity issue, Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980), and the Court of Appeals properly applied those decisions. Moreover, the Court has the issue before it again.

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[2] In fact, the Court of Appeals erred in holding that the invalidity of the depravity aggravating circumstance would not alone require resentencing due to the jury's finding of two other aggravating circumstances. Nevada's statute requires a balancing of aggravating and mitigating circumstances, and the state courts have no established procedure for curing consideration of an invalid aggravating circumstance. Indeed, Nevada courts have generally required resentencing "[b]ecause of the delicate task which the trier of fact has in weighing the mitigating circumstances against the aggravating circumstances. . . ." Dawson v. State, 734 P.2d 221, 223 (Nev. 1987).

Walton v. Arizona, No. 88-7351; Lewis v. Jeffers, No. 89-189. If the law changes, the State will be entitled to argue the effect of any new decisions to the lower court on retrial.

CONCLUSION

For the reasons set forth above, the Court should deny the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED this 18th day of December, 1989.

PERKINS COIE

By _____
David J. Burman

Counsel for Respondent

W9830g

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of December, 1989, the Brief in Opposition to Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis were deposited in a United States mailbox, with first-class postage prepaid, properly addressed to the Clerk of this Court. I further certify that on this 18th day of December, 1989, I deposited in a United States mailbox, with first-class postage prepaid, copies of the Brief in Opposition to Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis to Brian Randall Hutchins, Chief Deputy Attorney General, Capitol Complex - Heroes' Memorial Building,



Carson City, Nevada 89710, counsel for petitioner. I further certify that all parties required to be served have been served.

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Counsel for Respondent

Subscribed and sworn to before me this 18th day of December, 1989.

L. Marilyn Rogen
NOTARY PUBLIC in and for the State of Washington, residing at Federal Way.

My appointment expires: 5/4/92

9252G